

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
AUG 16 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of the Commission's Regulatory)
Policies to Allow Non-U.S.-Licensed Space)
Stations to Provide Domestic and International)
Satellite Service in the United States)

IB Docket No. 96-111

and)

Amendment of Section 25.131 of the)
Commission's Rules and Regulations to)
Eliminate the Licensing Requirement for)
Certain International Receive-Only Earth)
Stations)

CC Docket No. 93-23
RM-7931

and)

COMMUNICATIONS SATELLITE)
CORPORATION)
Request for Waiver of Section 25.131(j)(1))
of the Commission's Rules As It Applies to)
Services Provided via the Intelsat K Satellite)

File No. ISP-92-007

DOCKET FILE COPY ORIGINAL

**CONSOLIDATED REPLY COMMENTS OF
DIRECTV, INC., DIRECTV INTERNATIONAL, INC.,
AND HUGHES COMMUNICATIONS GALAXY, INC.**

Gary M. Epstein
John P. Janka
Teresa D. Baer
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 637-2200

August 16, 1996

No. of Copies rec'd 044
List ABCDE

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	2
I. MANY OF THE COMMENTERS AGREE WITH HUGHES THAT THE PROPOSED ECO-SAT TEST GOES BEYOND THE COMMISSION'S PROPER ROLE IN EVALUATING APPLICATIONS TO COMMUNICATE WITH NON-U.S.-LICENSED SATELLITES.	4
II. THERE IS OVERALL AGREEMENT ON CERTAIN ELEMENTS OF A NARROW ECO-SAT TEST THAT CAN BE ADAPTED TO ANY AGREEMENT REACHED AT THE WTO TALKS.....	9
A. Regulation Via Earth Stations.....	9
B. Markets To Be Analyzed	11
C. Service-by-Service Analysis	14
D. De Jure and De Facto Showings	16
E. Public Interest Factors.....	20
F. Observance of U.S. Legal, Technical, and Financial Requirements.....	21
III. THE COMMENTS MAKE CLEAR THAT THE COMMISSION SHOULD RETAIN LICENSING REQUIREMENTS FOR EARTH STATIONS COMMUNICATING WITH NON-U.S. SATELLITE SYSTEMS.....	22
CONCLUSION.....	24

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	
In the Matter of)	
)	
Amendment of the Commission's Regulatory)	IB Docket No. 96-111
Policies to Allow Non-U.S.-Licensed Space)	
Stations to Provide Domestic and International)	
Satellite Service in the United States)	
)	
and)	
)	
Amendment of Section 25.131 of the)	CC Docket No. 93-23
Commission's Rules and Regulations to)	RM-7931
Eliminate the Licensing Requirement for)	
Certain International Receive-Only Earth)	
Stations)	
)	
and)	
)	
COMMUNICATIONS SATELLITE)	File No. ISP-92-007
CORPORATION)	
Request for Waiver of Section 25.131(j)(1))	
of the Commission's Rules As It Applies to)	
Services Provided via the Intelsat K Satellite)	
_____)	

**CONSOLIDATED REPLY COMMENTS OF
DIRECTV, INC., DIRECTV INTERNATIONAL, INC.,
AND HUGHES COMMUNICATIONS GALAXY, INC.**

DIRECTV, INC. ("DIRECTV"), DIRECTV International, Inc. ("DTVI"), and Hughes Communications Galaxy, Inc. ("HCG") (collectively, "Hughes") submit these Consolidated Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") proposing a uniform procedural framework for evaluating applications by U.S. earth station users for authority to access non-U.S. licensed satellites. Many commenters agree with

Hughes that the Commission must ensure that, in formalizing its existing "open skies" policy, it does not inadvertently adopt a procedure that instead could impede the development of U.S. and global satellite competition. As set forth below, some moderation of the proposed ECO-Sat test therefore is necessary.

INTRODUCTION AND SUMMARY

In its opening comments, Hughes demonstrated that the Commission's market entry test should not be a strict reciprocity test. Hughes showed that, rather than creating a "tit-for-tat" entry test that inappropriately could involve the Commission in addressing non-communications-related issues, the Commission should maintain its long-standing "open skies" policy as a model for other countries, and make clear that U.S. markets are open to non-U.S.-licensed satellites except in those egregious cases in which foreign countries impose protectionist policies specifically designed to keep native industries free from competition or otherwise discriminate against potential U.S. competitors.¹ Hughes therefore suggested certain modifications to the Commission's proposed ECO-Sat test so that the test can increase U.S. and global competition in the provision of satellite services, facilitate the widest possible range of

¹ See, e.g., Petition to Deny of DIRECTV, Inc. in Telquest Ventures, L.L.C., FCC File Nos. 758-DSE-P/L-96, 759-DSE-L-96 (opposing request for Commission authority for earth station operator to communicate with a Canadian DBS satellite to provide Canadian DBS service to the U.S.); Petition to Deny of DIRECTV, Inc. in Western Tele-Communications, Inc., FCC File No. 844-DSE-P/L-96 (same). In denying both earth station applications on the ground that the applicants propose to use Canadian satellites that have not yet been licensed, the Commission also cited a letter to the Chairman of the Commission from four Executive Branch officials specifically noting that Canada unfairly discriminates against U.S. satellite operators in many ways. See Telquest Ventures, L.L.C. and Western Telecommunications, Inc., FCC File Nos. 758-DSE-P/L-96, 759-DSE-L-96, 844-DSE-P/L-96, at-3-4 (released July 15, 1996) (citing Letter from the Department of State, Office of the U.S. Trade Representative, Department of Commerce, and Department of Justice to Reed E. Hundt, Chairman, FCC (July 1, 1996)), petitions for reconsideration pending.

satellite service options from U.S. and non-U.S. systems for U.S. users, and encourage other countries to pursue procompetitive satellite regulatory policies.

With the exception of commenters whose goal in this proceeding appears to be the total exclusion of non-U.S.-licensed satellite systems from the U.S. market, many of the commenters agree with Hughes that the proposed ECO-Sat test goes too far and therefore could have anticompetitive consequences. As they correctly note, a reciprocity test could exceed the Commission's authority to regulate only communications matters. Moreover, since most countries have no satellites and thus no incentive to open their markets to U.S. satellite operators under a reciprocity policy, the proposed test could lead foreign administrations not to open their markets but instead to retaliate against U.S. operators seeking access abroad. Particularly in light of the pendency of the World Trade Organization ("WTO") talks on basic telecommunications, which are scheduled to conclude in only six months, the Commission must ensure that any market entry test that it develops continues the U.S. "open skies" tradition and serves as a transition to, and is readily adaptable to, the open market policies that may be agreed to in those negotiations.

Although the comments reflect a diverse range of views, there are a number of agreements on the elements of an ECO-Sat test that could provide a transitional framework for a global "open skies" policy. Aside from those commenters that urge the Commission to erect a high barrier to entry that seems to have the primary intent of excluding non-U.S.-licensed MSS and regional FSS systems from competing with them -- a "critical mass" test that would bar a non-U.S.-licensed system from the U.S. altogether if the openness of only one country's market

is questionable² -- the commenters generally agree that the Commission should examine whether there are any de jure or de facto barriers to U.S. satellite operators' access to a non-U.S.-licensed satellite operator's home or route markets. As Hughes discussed in its opening comments, and as other commenters note, the Commission also should consider any communications-oriented public interest factors that warrant prohibiting or allowing U.S. earth station operators access to the non-U.S.-licensed satellite despite the de jure and de facto showings, and allow entry except in cases of blatant protectionist practices. Properly applied, the proposed ECO-Sat test not only could provide a reasonable transition to the market-entry standard that may be agreed to in the ongoing multilateral WTO negotiations, but also would set fair terms for non-U.S. satellites to make competitive alternatives available to U.S. users and would encourage worldwide satellite competition.

I. MANY OF THE COMMENTERS AGREE WITH HUGHES THAT THE PROPOSED ECO-SAT TEST GOES BEYOND THE COMMISSION'S PROPER ROLE IN EVALUATING APPLICATIONS TO COMMUNICATE WITH NON-U.S.-LICENSED SATELLITES.

A large number of the commenters support Hughes' position that the Commission's proposed ECO-Sat test, as formulated in the Notice, could reverse the Commission's long-standing "open skies" policy and impede, rather than promote, U.S. and global competition in the delivery of satellite services. With some exceptions, the comments make clear that applying a strict reciprocity test to non-U.S.-licensed satellites could be

² See, e.g., Comments of Columbia Communications Corporation ("Columbia") at 23; Comments of Lockheed Martin Corporation ("Lockheed") at 11-13; Comments of Motorola Satellite Communications, Inc. ("Motorola") at 27-35; Comments of Teledesic Corporation ("Teledesic") at 7-9; Comments of TRW, Inc. ("TRW") at 12-26.

especially problematic. Moreover, the comments reflect a need to ensure that the market entry framework that the Commission adopts in this proceeding is sufficiently flexible that it can serve as a transition to the framework that is ultimately agreed to at the WTO talks on basic telecommunications scheduled to conclude in February 1997.³

No one remotely has contradicted Hughes' description of the Commission's existing policy toward non-U.S.-licensed satellite access to the U.S.⁴ As Hughes noted, the United States has long supported the free flow of ideas and information across national borders. Indeed, the Commission repeatedly has explained that "[t]he foundation of the U.S. international satellite policy is the establishment of a global competitive communications environment that provides customers with increased satellite service options, improved quality, and lower rates."⁵ To that end, the Commission on many occasions has allowed non-U.S.-licensed satellites to serve the United States.⁶ While it never has required foreign regulatory regimes to be identical to

³ The WTO's Group on Basic Telecommunications is limiting its negotiations to voice and data services. The talks do not encompass DTH services, however.

⁴ See Comments of DIRECTV, Inc., DIRECTV International, Inc., and Hughes Communications Galaxy, Inc. ("Hughes") at 6-8.

⁵ Vision Accomplished, Inc., 11 FCC Rcd 3716, 3718 (1995); accord IDB Worldcom Services, Inc., 10 FCC Rcd 7278, 7279 (1995).

⁶ See, e.g., Letter from Chief, Satellite and Radiocommunication Division, FCC International Bureau, to Counsel for HCG (July 17, 1996) (extending special temporary authority for HCG to use the Brasilsat A1 FSS satellite to provide U.S. domestic service from 79° W.L.); Vision Accomplished, Inc., 11 FCC Rcd 3716 (1995) (authorizing use of Japanese satellite to provide one-way video and audio services from Hawaii to Japan); IDB Worldcom Services, Inc., 10 FCC Rcd 7278 (1995) (authorizing a full range of telecommunications services between the U.S. and the Russian Federation and other international locations using Russian facilities); American Telephone and Telegraph Co., 8 FCC Rcd 2668 (1993) (permitting use of Intersputnik satellite system for telephone service between the U.S. and the Russian Federation); IDB Communications Group, Inc., 6 FCC Rcd 2932 (1991) (permitting use of Intersputnik for television and data services).

its own,⁷ the Commission also has preserved its ability to make exceptions to its “open skies” policy in cases, such as Canada’s treatment of foreign DTH satellites, in which foreign administrations discriminate against the U.S. and other foreign satellite operators by imposing protectionist barriers or otherwise creating sanctuary markets to preserve native industries from competition.

Like Hughes, a number of commenters note that the Commission’s proposed ECO-Sat test could result in a retreat from this procompetitive policy. As ICO Global Communications (“ICO”) correctly states, because it is a reciprocal restriction on trade, the proposed ECO-Sat test would infringe on Executive Branch jurisdiction over trade policy and could undermine the U.S. position in the multilateral WTO negotiations on basic telecommunications policy, which address the very issues that the Commission has raised in this proceeding relating to FSS and MSS services and which are scheduled to conclude in six months.⁸ Rather than examining issues that properly lie within the purview of the U.S. Trade Representative and other Executive Branch departments,⁹ the Commission’s role is and always

⁷ Vision Accomplished, Inc., 11 FCC Rcd at 3718.

⁸ See Comments of ICO Global Communications (“ICO”) at 12-21.

⁹ See Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, 11 FCC Rcd 1850, 1865 (1996) (“With respect to the other public interest factors laid out in the Foreign Carrier Entry Order, we note that the Executive Branch has not advised us of any national security, law enforcement, foreign policy, or trade concerns that support grant or denial of the petition.”); Market Entry and Regulation of Foreign Affiliated Entities, 11 FCC Rcd 3873, 3963 (1995) (noting the Executive Branch’s responsibility for trade matters); Regulatory Policies and International Telecommunications, 4 FCC Rcd 7387, 7396 (1988) (declining to adopt a reciprocity proposal in light of the Executive Branch’s statements that such a policy would be inconsistent with U.S. law and trade policy); American Telephone & Telegraph Company, 89 F.C.C.2d 1167 (1982) (deferring to the U.S. Trade Representative’s views regarding the inapplicability of U.S. international obligations to AT&T Section 214 application); Amendment (continued...)

has been limited to examining communications-related issues, including competition and spectrum issues. Indeed, other commenters concur with Hughes that it is inappropriate for the Commission to consider trade and foreign policy issues through its proposed ECO-Sat test, particularly in light of the pendency of the WTO talks.¹⁰

The Commission's proposal also may be ineffective in achieving the Commission's goals of opening foreign markets to U.S. satellites and enhancing global competition, as Hughes discussed in its opening comments.¹¹ Several commenters correctly point out that most countries do not have comparable satellite systems and do not seek to participate in the U.S. satellite market, nor do they have any incentive to open their markets to U.S. satellite systems.¹² Rather than give the Commission additional leverage to encourage these foreign administrations to open their markets to U.S. satellites, a strict market entry test instead

(...continued)

of Parts 76 and 78 of the Commission's Rules To Adopt General Citizenship Requirements for Operation of Cable Television Systems and for Grant of Station Licenses in the Cable Television Relay Service, 77 F.C.C.2d 73, 78-79 (1980) (declining to adopt a reciprocity condition on international trade and investment in securities on the ground that such measures were within the province of the Executive Branch).

¹⁰ See Comments of AirTouch at 8-10; Comments of GE American Communications, Inc. ("GE") at 5-8; Comments of ICO at 16-21; Comments of L/Q Licensee, Inc. and Loral Space & Communications Ltd. ("Loral") at 9-11.

¹¹ See Comments of Hughes at 9-10.

¹² See Comments of AirTouch at 2; Comments of Charter Communications International, Inc. ("Charter") at 4; Comments of GE at 4; Comments of ICO at 23-24, 35-36; Comments of Lockheed at 3; Comments of PanAmSat Corporation ("PanAmSat") at 1; Comments of Transworld Communications (U.S.A.), Inc. ("Transworld") at 4.

may have precisely the opposite effect, creating barriers to the development of satellite communications in other countries and prompting retaliatory trade initiatives abroad.¹³

The commenters that nevertheless urge the Commission to adopt a reciprocal ECO-Sat test do so in a transparent effort to keep from having to compete with non-U.S.-licensed satellite operators. They urge the Commission to adopt the most stringent foreign entry test possible -- a critical mass test under which questions as to the openness of a single country among all of the countries deemed to constitute a "critical mass" could preclude a non-U.S.-licensed system's access to U.S. users altogether.¹⁴ Accepting this approach not only would be wholly inconsistent with both the Commission's "open skies" policy and the U.S. Trade Representative's positions to date in the WTO talks, but by preventing the entry of additional competitors, it plainly would be anticompetitive because it would prevent U.S. users from having additional choices in the service sector. Such rigidity also most certainly would lead to retaliation against U.S. satellite operators rather than encouragement to foreign administrations to open their markets to U.S. competitors.

Taken as a whole and viewed in the light of the WTO talks, the comments reflect a need to ensure that any market entry test that the Commission adopts in this proceeding continues to carry out the Commission's "open skies" policy. As a transition to the open market test that the Commission likely will need to implement following the WTO talks, the

¹³ See Comments of GE at 4; Comments of Kokusai Denshin Denwa Co., Ltd. ("KDD") at 2; Comments of ICO at 35-37; Comments of Loral at 12-13.

¹⁴ See, e.g., Comments of Columbia at 22-23; Comments of Lockheed at 11-13; Comments of Motorola at 27-35; Comments of Orbital Communications Corporation ("Orbcomm") at 5; Comments of Teledesic at 7-9; Comments of TRW at 12-26, 32-33.

Commission therefore should use a more flexible version of its proposed ECO-Sat test.

Moreover, because there is a reasonable likelihood that U.S. policy will be solidifying in the near future as a result of the trade talks, the Commission must ensure that the transitional market entry test that it adopts in this proceeding is flexible enough to be adapted readily to a WTO agreement.

II. THERE IS OVERALL AGREEMENT ON CERTAIN ELEMENTS OF A NARROW ECO-SAT TEST THAT CAN BE ADAPTED TO ANY AGREEMENT REACHED AT THE WTO TALKS.

Despite the serious issues that a reciprocity test raises, there is broad consensus among the commenters that an ECO-Sat test can be developed that is consistent with the Commission's "open skies" policy and flexible enough to serve as a transition to a future, continuing procompetitive foreign market entry policy. In fact, apart from those commenters that appear to be using this proceeding for anticompetitive purposes, many commenters are in substantial agreement on certain of the elements of a more relaxed ECO-Sat test.

A. Regulation Via Earth Stations

The vast majority of commenters agree with Hughes that the Commission correctly proposes to regulate access to the U.S. by non-U.S.-licensed satellites via earth station regulation.¹⁵ Licensing U.S. earth stations that communicate with non-U.S.-licensed satellites gives the Commission a mechanism to ensure that the earth station is operating consistent with the Commission's requirements and is not accessing satellites with which it does not have

¹⁵ See Notice at ¶ 2; Comments of AT&T Corp. ("AT&T") at 8-10; Comments of Columbia at 6-8; Comments of Home Box Office ("HBO") at 9-10; Comments of Lockheed at 4-6; Comments of Loral at 15-16; Comments of Orion Network Systems, Inc. ("Orion") at 4.

authority to communicate. If the Commission instead were to “relicense” non-U.S.-licensed satellites, its efforts not only would be entirely duplicative of other administrations’ licensing schemes, but declining to recognize foreign administrations’ licensing authority could lead those governments to impose stricter requirements, including licensing requirements, on U.S. licensees seeking to provide satellite services abroad.

Continuing to regulate foreign entry via earth station authorizations will not be as burdensome on earth station applicants as some commenters (principally earth station operators) claim.¹⁶ After all, regulating foreign entry by earth station licensing always has been the Commission’s approach, and in the past earth station applicants routinely have satisfied the Commission’s requirements. Moreover, to the extent that the Commission now proposes to require an applicant to submit additional information about the non-U.S.-licensed satellite system with which it seeks authority to communicate, the earth station operator either should be in a position to obtain the required information about the non-U.S.-licensed system and the markets it serves from the satellite operator itself, or where the satellite operator has sold capacity to a customer, that customer should be in the best position to know or obtain the information.¹⁷ In addition, to avoid overburdening the Commission’s administrative processes with earth station applications, the Commission should continue to apply its existing policy of not granting earth

¹⁶ See, e.g., Comments of AlphaStar Television Network, Inc. (“AlphaStar”) at 5-7; Comments of Keystone Communications Corporation (“Keystone”) at 2-5; Comments of WorldCom, Inc. (“WorldCom”) at 7-8.

¹⁷ Special procedures, such as grants of special temporary authority, should continue to be available to address cases in which expedited treatment of earth station applications is necessary, such as newsgathering situations. See Comments of Capital Cities/ABC, Inc. CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. (“Networks”) at 19-22.

station licenses before either the Commission or a foreign administration has granted the satellite operator an appropriate license.¹⁸

B. Markets To Be Analyzed

In its opening comments, Hughes agreed with the Commission that, in determining whether to allow a non-U.S.-licensed satellite to have access to the U.S., it is appropriate to examine both the home (i.e., usually the licensing and coordination administration) and route markets of FSS and DBS satellites, and Hughes demonstrated that a critical mass test would be unfair to non-U.S. licensees and anticompetitive.¹⁹ The only parties that disagree with Hughes' view are those that apparently seek to bar competition from non-U.S.-licensed satellite operators completely and therefore urge the Commission to adopt a critical mass test.²⁰

At least with respect to analyzing applications for access to non-U.S.-licensed FSS and DBS satellites, the commenters generally agree with Hughes that, in addition to examining a non-U.S.-licensed satellite operator's home market, the Commission should examine each of the route markets that the non-U.S.-licensed satellite operator proposes to serve

¹⁸ See Telquest Ventures, L.L.C. and Western Telecommunications, Inc., FCC File Nos. 758-DSE-P/L-96, 759-DSE-L-96, 844-DSE-P/L-96 (released July 15, 1996) (dismissing as premature two applications for earth station licenses to communicate with Canadian DBS satellites, on the ground that Canada had not yet licensed the satellites with which the applicants requested authority to communicate), petitions for reconsideration pending.

¹⁹ See Comments of Hughes at 12-14.

²⁰ See Comments of Columbia at 23; Comments of Lockheed at 11-13; Comments of Motorola at 27-35; Comments of Orbcomm at 5; Comments of Teledesic at 7-9; Comments of TRW at 12-26.

from the U.S.-licensed earth station.²¹ In this way, the Commission can ensure that U.S.-licensed satellite operators have opportunities to compete on any routes being offered to U.S. users.

While there thus is support for a home/route market ECO-Sat test for FSS and DBS satellites, a large number of commenters oppose adopting a critical mass test for MSS systems for many of the reasons Hughes outlined in its opening comments. Indeed, as ICO correctly notes,²² a critical mass test is particularly unfair to non-U.S.-licensed systems because, under such an approach, a non-U.S.-licensed MSS operator would be precluded from serving the U.S. at all if the openness of only one critical mass country in the world is questionable. Under the critical mass threshold proposed by the U.S. MSS licensees -- a threshold on the order of 80% of the countries in the world -- it would be virtually impossible for any non-U.S.-licensed operator to meet such a requirement, or at least to do so within a reasonable time frame, particularly given the fact that few countries in the world even have regulatory regimes in place for satellites, much less regimes that would be similar to that of the Commission. Such an “all or nothing” approach only will exclude competitors from the U.S. marketplace and, in light of the central role that access to the U.S. market undoubtedly plays for international systems, also will hinder the development of satellite competition abroad.²³

²¹ See, e.g., Comments of AT&T at 5-6; Comments of Columbia at 11-13; Comments of Orion at 6-7; Comments of PanAmSat at 2-3; see also Comments of Networks at 17 (urging the Commission to examine only the specific U.S.-international route market proposed to be served).

²² See Comments of ICO at iv-vii, 16-27.

²³ See also Comments of Comsat Corporation (“Comsat”) at 27-29; Comments of KDD at 2; Comments of Orion at 8.

Adoption of a critical mass test would be especially unfair to global MSS systems, such as ICO. Because a critical mass test, by definition, arbitrarily discriminates among similarly situated systems, it wholly ignores the international nature of all MSS systems. For example, ICO has an ownership and foreign investment structure similar to that of the U.S.-licensed Big LEO systems in that its ownership includes a mix of U.S. and foreign investors, and ICO faces similar burdens in securing authorizations and service agreements in other countries. Consequently, there is no rational basis for subjecting a global MSS system such as ICO to a critical mass test that does not apply to the U.S. Big LEO systems as well.

Yet the critical mass tests proposed by U.S. Big LEO commenters such as Motorola and TRW are so stringent that they would virtually guarantee that U.S. licensees would be insulated from competition from ICO and other non-U.S.-licensed global MSS operators for years to come. Motorola and TRW propose entry tests that would require fully 80% of the home market countries of the direct and indirect owners of a non-U.S.-licensed MSS system as well as 80% of the total population of those countries to satisfy an ECO-Sat test, but would not allow operators such as ICO to serve the U.S. until all U.S. Big LEO systems -- apparently regardless of when they may be authorized or decide to commence service -- are granted access to the top ten markets (by population) of the non-U.S. system's investors.²⁴ Such tests are so strict and anticompetitive that it is hard to believe that Motorola and TRW could urge the Commission to adopt them with a straight face. What is worse, TRW's proposal to subject IGO affiliates like ICO to such a high standard for five full years after they are privatized is so blatantly a

²⁴ See Comments of Motorola at 27-35; Comments of TRW at 12-26.

protectionist effort to ensure that U.S. operators can gain an unfair headstart free from non-U.S. competitors that it simply cannot be considered a serious, procompetitive proposal.²⁵

C. Service-by-Service Analysis

Most commenters agree with Hughes that, in applying the proposed ECO-Sat test, the Commission should focus where possible on the treatment abroad of U.S. satellite operators seeking to provide the particular service that the non-U.S. operator seeks to provide in the U.S., such as FSS or DTH (including true DBS) service.²⁶ While such a service-by-service approach provides a meaningful determination of the openness of foreign markets, Hughes also agrees with those commenters that suggest that the relevant service categories are likely to evolve and converge over time, and that in some circumstances it therefore may be appropriate to examine subcategories of services in light of each service's unique characteristics and to use more flexible service categories.²⁷

Hughes strongly disagrees, however, with Teledesic's proposal to designate "interactive broadband satellite services" ("IBSS") as a separate, new subcategory.²⁸ As

²⁵ Lockheed urges the Commission to adopt a test that gives it the flexibility to examine varying markets -- such as route markets or a critical mass of markets -- depending on the particular circumstances. See Comments of Lockheed at 7-13. While some flexibility in applying its ECO-Sat test is essential in order to foster a procompetitive policy, the approach that Lockheed proposes would not afford earth station operators and non-U.S.-licensed satellite operators adequate certainty as to the circumstances under which non-U.S.-licensed satellites would be allowed access to the U.S.

²⁶ See Comments of Hughes at 14-15.

²⁷ See, e.g., Comments of Columbia at 13-14; Comments of HBO at 15-16; Comments of Lockheed at 10 n.10; Comments of Loral at 24-26; Comments of MCI Telecommunications Corporation ("MCI") at 12-13; Comments of Orion at 9; Comments of Teledesic at 4-7; Comments of TRW at 26-27.

²⁸ See Comments of Teledesic at 4-7.

proposed, IBSS would encompass all satellite systems providing switched, two-way service to end users over channels capable of at least 64 kbps. Examples of satellite systems that would fall into this separate subcategory include not only Teledesic's proposed system but also Hughes' Galaxy Spaceway system, a global satellite system that will provide interactive, broadband communications services to ultra small satellite terminals, including high-speed, high-capacity data distribution and access to the Internet as well as other business services. Although Teledesic presumably seeks to give an advantage to systems such as its own proposed system and Hughes' Galaxy Spaceway system, it is not an advantage that makes any sense.

Teledesic bases its proposal on the argument that "interactive broadband" services do not fit neatly within the definition of either MSS or FSS. While service definitions are breaking down, Teledesic's cure does not work. As an initial matter, two-way (or "interactive") FSS services are routinely provided today through VSAT networks that countless businesses rely on every day. The amount of bandwidth (greater or less than 64 kbps) that these systems use is simply a function of the amount of data that they need to transmit at a given time; video transmissions typically require more spectrum than data transmissions.

As a policy matter, unlike FSS, MSS, and DTH, which generally are recognized around the world as different classes of radiocommunication services, "IBSS" is an arbitrary subcategory that is more limited (e.g., switched, two-way 64 kbps) than the classes that the Commission proposes. Moreover, defining a new service on the basis of the size of the communications channels makes no sense because it is necessarily arbitrary and could needlessly

tie the Commission's policy to a "target" channel size that likely will change over time as technology progresses.²⁹

D. De Jure and De Facto Showings

While there is some disagreement among the commenters, there is substantial agreement with Hughes' support of the Commission's proposal to have earth station applicants bear the initial burden of demonstrating the absence of de jure barriers to competition on the home and route markets at issue, and to have opponents bear the burden of demonstrating that de facto barriers to competition exist. Structuring the analysis in this manner is appropriate because, consistent with its "open skies" policy, the Commission presumptively should allow access to non-U.S.-licensed satellites in order to promote U.S. and global competition. Those commenters that urge that the earth station applicant should bear the entire burden of identifying and rebutting the particular circumstances that opponents might think make a foreign market de facto closed to

²⁹ Orion and WorldCom also urge the Commission to distinguish between domestic and international service in applying the proposed ECO-Sat test. *See* Comments of Orion at 9-10; WorldCom Comments at 6. The Commission already abolished this distinction in DISCO I. *See Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996). Moreover, since neither other countries nor the ITU generally distinguishes between domestic and international satellites, there is no reason to make such a distinction here.

Teledesic similarly appears to urge the Commission to adopt a critical mass test for IBSS on the ground that such a test could distinguish between the provision of IBSS service within a country's borders and the provision of such service across national borders. *See* Teledesic Comments at 7-9. Teledesic's argument makes no sense. Since neither other countries nor the ITU presently makes a distinction between domestic and international service, Country X that prohibits a domestic service by a U.S.-licensed satellite is very unlikely to permit the same service between Country X and the U.S.

U.S. competitors seek only to find a way to make the showing so burdensome that non-U.S.-licensed satellite operators rarely, if ever, could obtain access to the U.S.³⁰

With respect to the de jure showing requirement, the comments are divided on the Commission's proposal that the applicant should be deemed to have satisfied the requirement if the particular country and service at issue appear on a list, to be maintained by the International Bureau, of the countries that U.S.-licensed satellites serve and the services that they provide there.³¹ Many commenters agree with Hughes that such a list would be helpful to earth station applicants,³² and they similarly propose that U.S.-licensed satellite operators should be required to provide the information for that list on an annual basis,³³ incorporating the information, if possible, in other required filings. Many of the satellite operators that would be required to provide this information urge the Commission not to adopt the proposal, contending largely that such a requirement would be overly burdensome on them or might not provide the most up-to-date information.³⁴ While filing additional information necessarily imposes some additional

³⁰ See, e.g., Comments of TRW at 27.

³¹ See Notice at ¶ 39.

³² See Comments of Hughes at 15-16.

³³ See, e.g., Comments of AlphaStar at 6-7; Comments of Keystone at 3-4; Comments of WorldCom at 8 n.8. AlphaStar proposes that U.S. satellite operators update the information on the countries they serve and the services they provide on at least a quarterly basis. See Comments of AlphaStar at 6-7. Requiring the compilation of such information on more than an annual basis would be unduly burdensome to U.S. satellite operators.

³⁴ See, e.g., Comments of Columbia at 17; Comments of Lockheed at 8 n.9; Comments of MCI at 22; Comments of Orion at 10; Comments of PanAmSat at 3-4; Comments of TRW at 28-29. Although some commenters urge that the Commission's proposal would require the submission of proprietary information, see, e.g., Comments of MCI at 22; Comments of PanAmSat at 3-4, it is hard to imagine how the commercial services that a satellite operator provides and the locations in which it provides those services -- not who its customers or what its revenues are -- possibly could be confidential. In any event, the Commission has rules in place to handle the

(continued...)

burden on U.S. satellite operators, and while information as to where they already provide service may not advise the Commission and earth station applicants of the latest market openings and closings, on balance maintaining the proposed list will assist earth station applicants in collecting the information they need to satisfy the de jure showing requirement.³⁵

With respect to the de facto showing requirement, the commenters suggest a number of different factors that could constitute de facto barriers to competition in foreign markets.³⁶ As Hughes noted in its opening comments, there can be no finite list of de facto barriers that might impede U.S. satellite operators from competing abroad.³⁷ Depending on the circumstances, a wide range of communications-related factors therefore may be relevant.

MCI errs, however, in urging the Commission to include content regulation as a market entry barrier for DTH systems, whether as part of the de jure or de facto showing requirement.³⁸ If the Commission were to accept MCI's argument, almost no non-U.S.-licensed satellite ever could satisfy the ECO-Sat test, because virtually every country in the world,

(...continued)

submission of confidential information, and there is no reason why those rules would not apply here.

³⁵ If a country has no laws or rules regarding foreign satellite entry, it of course should be presumed to have no de jure barriers to entry by U.S. satellite operators.

³⁶ See, e.g., Comments of General Instrument Corporation ("General Instrument") at 4-7 (impact of technical standards); Comments of Teledesic at 3 (spectrum scarcity); Comments of TRW at 30 n.59 (availability of interconnection to the public switched network).

³⁷ See Comments of Hughes at 16; see also Comments of Lockheed at 7-9.

³⁸ See, e.g., Comments of MCI at 16-19.

including the U.S., has some form of content regulation.³⁹ Since the Commission has no logical means of determining which forms of content regulation serve legitimate needs, it must be particularly careful not to allow the review of such regulation to overtake its ECO-Sat analysis.

As Hughes noted in its opening comments, content regulations should be relevant only in situations in which the restrictions are part of a broader discriminatory policy brought to the Commission's attention by the Executive Branch.⁴⁰ Examples of discriminatory content policies would include limitations on competition where, as in the Canadian DTH situation, foreign regulators purposely discriminate against potential U.S. competitors by imposing limits on programming of foreign origin that amount to the protection of a sanctuary market, or by restricting the facilities over which programming is transmitted. In such cases, there can be no serious dispute that a foreign regulator is enforcing a policy specifically designed to protect its home market at the expense of competition.

Finally, as alternatives to examining de jure and de facto barriers, some commenters propose other tests that the Commission could use to determine whether to permit a U.S. earth station operator to communicate with a non-U.S.-licensed satellite. For example, some commenters urge the Commission to extend the "no special concessions" policy that currently applies to U.S.-licensed Big LEOs to all systems accessing the U.S. and to encourage

³⁹ For example, U.S. content regulations include children's television requirements, indecency limitations, and tobacco advertising restrictions.

⁴⁰ See Comments of Hughes at 17-18.

other administrations to adopt the same policy.⁴¹ Hughes supports this proposal because it would ensure fairness to, and equal treatment of, all satellite operators.⁴²

E. Public Interest Factors

There is broad agreement among the commenters with Hughes' position that examination of public interest factors is critical, and that the Commission should limit consideration of those factors to communications-related factors.⁴³ For example, commenters properly suggest that the Commission should consider competitive issues and spectrum coordination in its analysis.⁴⁴ In contrast, issues such as national security, foreign policy, and trade, which the Commission mentions as possible public interest factors,⁴⁵ are not appropriate factors for the Commission to take into account unless the Executive Branch brings those issues to its attention in a specific instance. Such issues fall under the jurisdiction of the Executive Branch and are not legitimate communications-related issues that lie within the purview of the Commission's regulation of entry by non-U.S.-licensed satellites.

⁴¹ See, e.g., Comments of ICO at 37-41; Comments of Motorola at 37-38; Comments of TRW at 37-39.

⁴² In addition, some commenters question whether the Commission should retain its existing policy permitting the use of non-U.S.-licensed satellites when there is a lack of domestic capacity. See, e.g., Comments of General Instrument at 7-8; Comments of Loral at 16; Comments of Western Tele-Communications, Inc. ("WTCI") at 3-7. By considering a wide range of issues, however, the proposed ECO-Sat test would render the existing lack of capacity test moot.

⁴³ See id. at 18-19.

⁴⁴ See, e.g., Comments of Loral at 23; Comments of Motorola at 35-37.

⁴⁵ See Notice at ¶ 48.

F. Observance of U.S. Legal, Technical, and Financial Requirements

While commenters take diverse positions on the extent to which non-U.S.-licensed satellites should be required to comply with U.S. legal, technical, and financial requirements, there is broad agreement with Hughes that requiring full compliance with those requirements as the Commission proposes in the Notice would conflict with the Commission's intent to accept the sufficiency of foreign licensing processes and could invite foreign administrations to impose additional requirements on U.S. satellite operators seeking to provide service abroad.⁴⁶ There is an emerging consensus around Hughes' position that, in the typical case, non-U.S. satellites should be required to comply only with technical parameters relating to interference considerations.⁴⁷ After all, the U.S. interest is in ensuring that non-U.S.-licensed satellites do not cause harmful interference to U.S. licensees and can coexist with U.S. satellites. Except where a satellite operator chooses to circumvent the Commission's licensing process, the Commission has no legitimate interest in requiring non-U.S.-licensed satellites to satisfy its financial and legal requirements, or other technical requirements unrelated to interference issues.⁴⁸

⁴⁶ See, e.g., Comments of Comsat Corporation ("Comsat") at 36-39; Comments of Loral at 21-22; Comments of Orion at 5; Comments of WorldCom at 5-9.

⁴⁷ See, e.g., Comments of Hughes at 20-22; Comments of Loral at 21-23; see also Comments of WorldCom at 5-9.

⁴⁸ The commenters also address the Commission's questions relating to other procedural aspects of the proposed ECO-Sat test. Most parties agree with Hughes that the Commission's market entry test should apply to pending applications, since the substantive policy being applied has not changed and applicants have long been on notice that the Commission was considering the formalization of that policy. See, e.g., Comments of AlphaStar at 4-5; Comments of Columbia at 9-11; Comments of Hughes at 19-20. In addition, commenters generally agree with Hughes that, for their own protection, the Commission should consider applications from U.S. and non-U.S. systems concurrently, but should not require participation in processing rounds as a

(continued...)

III. THE COMMENTS MAKE CLEAR THAT THE COMMISSION SHOULD RETAIN LICENSING REQUIREMENTS FOR EARTH STATIONS COMMUNICATING WITH NON-U.S. SATELLITE SYSTEMS.

The comments provide support for the Commission's proposals with respect to licensing receive-only earth stations.⁴⁹ There is complete agreement with the Commission's proposals to eliminate the requirement for receive-only earth stations communicating with U.S. satellite systems for the reception of programming from foreign locations,⁵⁰ and to provide for blanket licensing for identical receive-only earth stations (particularly for DTH antennas) and for MSS handsets.⁵¹ The only disagreements center around the Commission's proposal to retain its existing licensing requirement for receive-only earth stations communicating with non-U.S. satellite systems.

As Hughes noted in its opening comments, and as other parties similarly have noted,⁵² retaining the licensing requirement for receive-only earth stations accessing non-U.S.-licensed satellites is necessary now that the Commission is formalizing its "open skies" policy.

(...continued)

condition of serving U.S. users. See, e.g., Comments of AT&T at 10; Comments of Hughes at 10 n.16; Comments of Lockheed at 6; Comments of PanAmSat at 4-5. PanAmSat errs, however, in urging the Commission not to hold processing rounds for international satellites. See PanAmSat Comments at 4-5. The Commission already considered and rejected that argument in DISCO I. See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd 2429, 2436 (1996).

⁴⁹ See Notice at ¶¶ 75-80.

⁵⁰ See, e.g., Comments of AlphaStar at 7; Comments of Hughes at 23; Comments of PanAmSat at 9.

⁵¹ See, e.g., Comments of AlphaStar at 8; Comments of AT&T at 18; Comments of Hughes at 24.

⁵² See Comments of AlphaStar at 7-8; Comments of AT&T at 17-19; Comments of Hughes at 23-24; Comments of PanAmSat at 9.

The licensing requirement is necessary because the Commission must retain some practical recourse against a non-U.S.-licensed satellite operator that may be causing harmful interference to U.S. satellites and their users. Those commenters that urge the Commission to adopt its 1993 proposal to deregulate receive-only earth stations⁵³ and to abolish the existing licensing policy⁵⁴ ignore the fact that, short of relicensing non-U.S.-licensed satellites -- an approach of which the commenters uniformly disapprove -- maintaining licensing requirements for receive-only earth stations communicating with non-U.S.-licensed satellites is the only way to ensure that the Commission's market entry policy is followed.⁵⁵ For the same reasons, the Commission should no longer exempt earth stations operating with the Intelsat K satellite from obtaining licenses, and instead should require that any new provision of such service be subject to the licensing process, including an ECO-Sat analysis.

⁵³ See Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations, Notice of Proposed Rulemaking, 8 FCC Rcd 1720 (1993).

⁵⁴ See, e.g., Comments of Charter at 6; Comments of Comsat Corporation at 39-42; Comments of Keystone at 5-7; Comments of Transworld at 5-6; Comments of WTCI at 14-17.

⁵⁵ Eliminating the licensing requirement for receive-only earth stations communicating with non-U.S.-licensed satellites also improperly would give satellite operators licensed by governments that maintain sanctuary markets a "back-door" way to enter the U.S. market.